

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BRADLEY G. DRUMMOND,

Plaintiff

v.

JAMES DZURENDA, et. al.,

Defendants

Case No.: 3:18-cv-00152-MMD -WGC

**Report & Recommendation of
United States Magistrate Judge**

Re: ECF No. 53

This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

Before the court is Defendants' Motion for Summary Judgment. (ECF Nos. 53, 53-1 to 53-9, 55-1.) Plaintiff filed a document he titled as his opposition to motion for summary judgment and his cross-motion for summary judgment. (ECF No. 58.) Defendants filed a reply. (ECF No. 66.) As Defendants' point out, to the extent Plaintiff titled his document a cross-motion for summary judgment, it was filed beyond the extended August 24, 2020 deadline for dispositive motions (ECF No. 51), and Plaintiff did not seek leave to file a belated cross-motion. In addition, even if it were timely, it does not comply with Rule 56's requirement that a party asserting a fact cannot be or is genuinely disputed must support the assertion by citing particular parts of materials in the record. Fed. R. Civ. P. 56(c)(1). Plaintiff does not do so. Therefore, the filing should not be treated as a cross-motion for summary judgment, but only as a response to Defendants' motion.

1 Plaintiff then filed a "response to Defendants' Support of Motion for Summary Judgment"
2 on September 28, 2020, where he attaches various notices of charges as well as an inmate
3 grievance report with the first level response to grievance 2006-30-30917¹. (ECF No. 67.)

4 Finally, Plaintiff filed a response to Defendants' reply. (ECF No. 68.) A response to a
5 reply is known as a sur-reply. Sur-replies are not permitted without leave of court. LR 7-2(b).
6 Plaintiff did not seek leave of court to file a sur-reply; therefore, it is recommended that his sur-
7 reply (ECF No. 68) be stricken.

8 After a thorough review, it is recommended that Defendants' motion be granted.

9 **I. BACKGROUND**

10 Plaintiff is an inmate in the custody of the Nevada Department of Corrections (NDOC),
11 proceeding pro se with this action pursuant to 42 U.S.C. § 1983. (Compl., ECF No. 5.) The
12 events giving rise to this action took place while Plaintiff was housed at Lovelock Correctional
13 Center (LCC). (*Id.*) Defendants are Ashley Angus, Renee Baker, Tara Carpenter, Paul Malay,
14 and William Sandie. Defendant Godecke was dismissed without prejudice for failure to timely
15 serve him pursuant to Federal Rule of Civil Procedure 4(m). (ECF No. 63.)

16 The court screened Plaintiff's complaint and allowed him to proceed with retaliation and
17 equal protection claims against Defendants. (Screening Order, ECF No. 4.) He was also allowed
18 to proceed with excessive force and retaliation claims against Godecke, but those claims have
19 been dismissed without prejudice.

20 In Count I, Plaintiff was allowed to proceed with an equal protection claim against Baker,
21 Carpenter, Malay and Angus, based on allegations that he was physically impaired and required
22 crutches, and these Defendants denied him special access to the dining hall and forced him to
23

¹ This is the same as Defendants' exhibit set forth at ECF No. 53-5 at 8.

1 stand for count when other physically impaired inmates did not have to do the same, and without
2 any rational basis.

3 In Count II, Plaintiff was allowed to proceed with a retaliation claim against Baker,
4 Sandie, Carpenter, Malay and Angus. By way of background, Plaintiff alleges that he utilizes
5 crutches, and on August 2, 2016, Godecke utilized excessive force against him, forcing him to
6 hop on one leg without his crutches for more than 500 feet. He avers that after this, he was
7 harassed for filing a grievance that reported Godecke's acts. Specifically, he alleges that Baker,
8 Sandie, Carpenter, Malay and Angus retaliated against him by punishing him for filing the
9 grievance reporting Godecke when: he was found guilty of a rule infraction and sanctioned to the
10 loss of privileges given to phase 1 general population inmates; he was sanctioned to punishment
11 not given by the hearing officer; and he was put in a restrictive housing unit. Baker and Angus
12 allegedly told him, "This is what happens when you complain and write grievances." He claims
13 that Angus told him that she would continue issuing write-ups every time Plaintiff would not
14 stand for count.

15 In Count II, Plaintiff was also permitted to proceed with an equal protection claim against
16 Baker, Carpenter, Malay and Angus based on allegations that he began getting notices of charges
17 for rule violations unlike other inmates that violated the same rules, and they wrote him up for
18 charges that other similarly situated inmates on the phase 1 yard did not get written up for.

19 Defendants move for summary judgment, arguing: (1) Plaintiff failed to exhaust his
20 administrative remedies; (2) the equal protection claim fails because there was a rational basis
21 for issuing the notice of charges to Plaintiff and Plaintiff cannot establish an intent and purpose
22 to discriminate; (3) the retaliation claim fails because Defendants' actions were the result of
23 plaintiff's violations of operating procedures and not retaliation for protected activity; and

(4) alternatively, Defendants are entitled to qualified immunity.

II. LEGAL STANDARD

The legal standard governing this motion is well settled: a party is entitled to summary judgment when “the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Cartrett*, 477 U.S. 317, 330 (1986) (citing Fed. R. Civ. P. 56(c)). An issue is “genuine” if the evidence would permit a reasonable jury to return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A fact is “material” if it could affect the outcome of the case. *Id.* at 248 (disputes over facts that might affect the outcome will preclude summary judgment, but factual disputes which are irrelevant or unnecessary are not considered). On the other hand, where reasonable minds could differ on the material facts at issue, summary judgment is not appropriate. *Anderson*, 477 U.S. at 250.

“The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the facts before the court.” *Northwest Motorcycle Ass’n v. U.S. Dep’t of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994) (citation omitted); *see also Celotex*, 477 U.S. at 323-24 (purpose of summary judgment is “to isolate and dispose of factually unsupported claims”); *Anderson*, 477 U.S. at 252 (purpose of summary judgment is to determine whether a case “is so one-sided that one party must prevail as a matter of law”). In considering a motion for summary judgment, all reasonable inferences are drawn in the light most favorable to the non-moving party. *In re Slatkin*, 525 F.3d 805, 810 (9th Cir. 2008) (citation omitted); *Kaiser Cement Corp. v. Fischbach & Moore Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986). That being said, “if the evidence of the nonmoving party “is not significantly probative, summary judgment may be granted.” *Anderson*, 477 U.S. at 249-250 (citations omitted). The court's function is not to weigh the evidence and

1 determine the truth or to make credibility determinations. *Celotex*, 477 U.S. at 249, 255;
2 *Anderson*, 477 U.S. at 249.

3 In deciding a motion for summary judgment, the court applies a burden-shifting analysis.
4 “When the party moving for summary judgment would bear the burden of proof at trial, ‘it must
5 come forward with evidence which would entitle it to a directed verdict if the evidence went
6 uncontroverted at trial.’ ... In such a case, the moving party has the initial burden of establishing
7 the absence of a genuine [dispute] of fact on each issue material to its case.” *C.A.R. Transp.*
8 *Brokerage Co. v. Darden Rest., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (internal citations
9 omitted). In contrast, when the nonmoving party bears the burden of proving the claim or
10 defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate
11 an essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving
12 party cannot establish an element essential to that party’s case on which that party will have the
13 burden of proof at trial. *See Celotex Corp. v. Cartrett*, 477 U.S. 317, 323-25 (1986).

14 If the moving party satisfies its initial burden, the burden shifts to the opposing party to
15 establish that a genuine dispute exists as to a material fact. *See Matsushita Elec. Indus. Co. v.*
16 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The opposing party need not establish a genuine
17 dispute of material fact conclusively in its favor. It is sufficient that “the claimed factual dispute
18 be shown to require a jury or judge to resolve the parties’ differing versions of truth at trial.”
19 *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987)
20 (quotation marks and citation omitted). The nonmoving party cannot avoid summary judgment
21 by relying solely on conclusory allegations that are unsupported by factual data. *Matsushita*, 475
22 U.S. at 587. Instead, the opposition must go beyond the assertions and allegations of the
23

pleadings and set forth specific facts by producing competent evidence that shows a genuine dispute of material fact for trial. *Celotex*, 477 U.S. at 324.

III. DISCUSSION

A. Exhaustion

1. Standard

The Prison Litigation Reform Act (PLRA) provides that “[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). An inmate must exhaust his administrative remedies irrespective of the forms of relief sought and offered through administrative avenues. *Booth v. Churner*, 532 U.S. 731, 741 (2001).

The failure to exhaust administrative remedies is “an affirmative defense the defendant must plead and prove.” *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014) (quoting *Jones v. Bock*, 549 U.S. 199, 204, 216 (2007)). Unless the failure to exhaust is clear from the face of the complaint, the defense must be raised in a motion for summary judgment. *See id.* (overruling in part *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003) which stated that failure to exhaust should be raised in an “unenumerated Rule 12(b) motion”).

“If undisputed evidence viewed in the light most favorable to the prisoner shows a failure to exhaust, a defendant is entitled to summary judgment under Rule 56. If material facts are disputed, summary judgment should be denied, and the district judge rather than a jury should determine the facts [in a preliminary proceeding].” *Id.*, 1168, 1170-71 (citations omitted). “Exhaustion should be decided, if feasible, before reaching the merits of a prisoner’s claim. If discovery is appropriate, the district court may in its discretion limit discovery to evidence

1 concerning exhaustion, leaving until later—if it becomes necessary—discovery related to the
2 merits of the suit." *Id.* at 1170 (citing *Pavey v. Conley*, 544 F.3d 739, 742 (7th Cir. 2008)). If
3 there are disputed factual questions, they "should be decided at the very beginning of the
4 litigation." *Id.* at 1171.

5 Once a defendant shows that the plaintiff did not exhaust available administrative
6 remedies, the burden shifts to the plaintiff "to come forward with evidence showing that there is
7 something in his particular case that made the existing and generally available administrative
8 remedies effectively unavailable to him." *Id.* at 1172 (citing *Hilao v. Estate of Marcos*, 103 F.3d
9 767, 778 n. 5 (9th Cir. 1996)); *Draper v. Rosario*, 836 F.3d 1072, 1080 (9th Cir. 2016) (inmate
10 plaintiff did not meet his burden when he failed to identify any actions prison staff took that
11 impeded his ability to exhaust his administrative remedies, or otherwise explain why he failed to
12 comply with the administrative remedies process)). The ultimate burden of proof, however,
13 remains with the defendant. *Id.*

14 The Supreme Court has clarified that exhaustion cannot be satisfied by filing an untimely
15 or otherwise procedurally infirm grievance, but rather, the PLRA requires "proper exhaustion."
16 *Woodford v. Ngo*, 548 U.S. 81, 89 (2006). "Proper exhaustion" refers to "using all steps the
17 agency holds out, and doing so *properly* (so that the agency addresses the issues on the merits)."
18 *Id.* (emphasis in original) (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002)).
19 Thus, "[s]ection 1997e(a) requires an inmate not only to pursue every available step of the prison
20 grievance process but also to adhere to the 'critical procedural rules' of that process." *Reyes v.*
21 *Smith*, 810 F.3d 654, 657 (9th Cir. 2016) (quoting *Woodford*, 548 U.S. at 90). "[I]t is the prison's
22 requirements, and not the PLRA, that define the boundaries of proper exhaustion." *Jones v.*
23 *Bock*, 549 U.S. 199, 218 (2007).

1 To reiterate, an inmate need only exhaust “available” administrative remedies. *See Ross*
2 *v. Blake*, 136 S.Ct.1850, 1858 (2016). “Accordingly, an inmate is required to exhaust those, but
3 only those, grievance procedures that are ‘capable of use’ to obtain ‘some relief for the action
4 complained of.’” *Id.* at 1859 (quoting *Booth*, 532 U.S. at 738).

5 **2. Analysis**

6 Exhaustion of administrative remedies within NDOC is governed by Administrative
7 Regulation (AR) 740. Inmates are expected to resolve issues through discussion with their
8 caseworker prior to initiating the grievance process, and if unsuccessful, inmates must pursue a
9 grievance through three levels: the informal, first and second levels. Informal grievances must be
10 initiated within 6 months for issues involving personal property, personal injury, medical claims
11 or other tort claims, including civil rights claims. The failure to submit a proper informal
12 grievance within the noted timeframe constitutes abandonment of the grievance at all levels.
13 (ECF No. 53-3.)

14 An inmate may also file an emergency grievance. The shift supervisor may confer with
15 on duty staff and determine whether the grievance constitutes an emergency. If the inmate
16 requests further review of a claim not deemed an emergency, the inmate may file a grievance
17 appeal commencing at the informal level. (*Id.*)

18 According to Plaintiff's complaint the issues giving rise to his claim occurred in August
19 and September of 2016. (EF No. 5 at 2.) Since Plaintiff's alleged civil rights violations occurred
20 in August and September of 2016, under AR 740, the informal level grievances had to be filed
21 within six months, or by March of 2017. Defendants provide evidence that between August 2,
22 2016 and March of 2017, Plaintiff filed only two grievances: grievance 2006-30-20917 and
23 grievance 2006-30-33314. (ECF No. 53-4.)

a. Grievance 2006-30-20917

Plaintiff filed a grievance, 2006-30-20917, on August 9, 2016. He stated that on the morning of August 2, 2016, he and Godecke exchanged words about his coming through the back door on his crutches, with Godecke insisting that Plaintiff had to get a medical slip giving him permission to use the back door, which Plaintiff claimed was safer for him. Godecke made him go down and walk using the regular inmate line while on his crutches, which Plaintiff claimed was dangerous because there is a narrow walkway between the railing and adjacent wall and he was using crutches. Godecke then handcuffed Plaintiff while on his crutches, and Plaintiff told him he could not walk without his crutches. Godecke said he could walk because Godecke had seen him do so. Then Godecke yanked him several times, twisting his left knee. Plaintiff stated; "The reason for the grievance is because C/O Godeckie handcuffed me on the crutches which jeopardized my safety and well being, I could have fallen [and] hit my head on a table or the ground causing me to have a seizure which I suffer from." (ECF No. 53-5 at 11-15.)

M. McClellan responded to the informal level grievance, stating that according to medical there was no reason that Plaintiff could not stand in line for meals, and he should have followed the officer's advice to go to medical and either have a "lay in" order or medical slip advising staff of any and all restrictions. Instead, Plaintiff became argumentative and belligerent toward staff. He was advised see medical to follow up on any restrictions so staff are aware and cognizant of all constraints and limitations. (ECF No. 53-5 at 12.)

Plaintiff filed a first level grievance on October 24, 2016. He stated that he followed Godecke's advice and went to medical to get a slip to okay him to use the exit door to come and sit down while his cellmate got his tray. Medical told him that "[we] don't do that here" and that he "would have to fend for [him]self." He did not deny they "had some words." Plaintiff

1 continued to state that the whole point of his grievance was that Godecke should never have
2 handcuffed Plaintiff while he was on his crutches, but should have called search and escort to
3 escort him to operations. He went on to state that he next day C/O Rodriguez told me he talked to
4 the sergeants and lieutenants and they told him that Plaintiff could go through the exit door and
5 sit down while his cellmate or someone got his tray for him. He explained that if he went through
6 the "chow line" on his crutches and tripped and fell and got hurt, the prison and officers on duty
7 would be liable. (ECF No. 53-5 at 7, 9.)

8 Carpenter issued an improper grievance memorandum because Plaintiff had not
9 submitted his informal grievance with the first level, and directed Plaintiff to resubmit. (ECF No.
10 53-5 at 10.) Plaintiff appears to have resubmitted the first level grievance with informal level.
11 (*See* ECF No. 53-4 at 3-4.)

12 Baker responded to the first level grievance, finding that Godecke followed policy and
13 procedure once Plaintiff was placed in restraints, as a hands-on escort was administered to ensure
14 Plaintiff did not fall or trip, by holding the inmate's arm to guide the inmate. She also found
15 Plaintiff's behavior was inappropriate and uncalled for. She went on to state:

16 Secondly, it then appears that your verbiage becomes no better
17 with review of a Misconduct report dated September 11th, 2016,
18 and then your refusal to follow direct orders on September 15th
19 and 16th, 2016 (failure to stand for Health and Welfare count)
20 which has now lead to a guilty General Violation and a Level
21 Reduction. Grievance denied.

22 (ECF No. 53-5 at 8.)

23 He filed a second level grievance on January 3, 2017. He reiterated that Godecke should
have detained him until search and escort got there to escort him while he was on his crutches,
but Godecke started yanking and dragging him around. (ECF No. 53-5 at 2, 5.)

1 Carpenter issued an improper grievance memorandum for the second level grievance on
2 January 5, 2017, as Plaintiff did not include the informal and first levels, and directed Plaintiff to
3 resubmit with those attached. (ECF No. 53-5 at 6.)

4 Plaintiff appears to have resubmitted the second level grievance. (ECF No. 53-4 at 4-5.)

5 Tristan responded to the second level grievance, stating that it was forwarded to the
6 Inspector General's Office for investigation, and insofar as that was done the grievance was
7 partially granted. (ECF No. 53-5 at 3-4.)

8 While Plaintiff briefly references being able to go through the exit door to get into the
9 dining hall, Plaintiff made clear at all levels that the purpose of his grievance was to address
10 Godecke's conduct in escorting him while using his crutches. Moreover, the grievance never
11 asserted that by not allowing him to go through the exit door, he was being treated differently
12 than similarly situated inmates. Instead, the focus of the grievance was admittedly Godecke's
13 behavior.

14 The claim against Godecke has been dismissed without prejudice. This grievance did not
15 serve to exhaust administrative remedies with respect to his equal protection or retaliation claims
16 against the remaining defendants.

17 **b. Grievance 2006-30-33314**

18 Plaintiff filed a second grievance, 2006-30-33314, which was an emergency grievance,
19 on September 16, 2016. Plaintiff stated that he was filing the emergency grievance on Angus
20 because Plaintiff would not stand during count. Plaintiff said that he told her that the doctor told
21 him to stay off of his leg and that he only walks with crutches to chow, pill call and the shower.
22 He felt her conduct was in retaliation for filing the grievance against Godecke. (ECF No. 53-6 at
23 2.)

1 There is a response to the grievance that same day, which advised Plaintiff that it was not
2 an emergency as outlined in AR 740, and that Plaintiff was required to stand for count, and his
3 refusal would result in a notice of charges. (*Id.*) At the bottom of the grievance, which Plaintiff
4 signed, it states: "A FORMAL GRIEVANCE MAY BE PURSUED IN THE EVENT THE
5 INMATE DISAGREES." (*Id.*)

6 Plaintiff did not pursue the grievance further as he was required to do under AR 740.
7 Therefore, this grievance does not serve to have exhausted administrative remedies with respect
8 to the remaining claims proceeding in this action.

9 **3. Conclusion**

10 Plaintiff has not argued, let alone produced evidence, to demonstrate that he filed another
11 grievance that may have exhausted his administrative remedies. Nor has he provided argument or
12 evidence that administrative remedies were somehow unavailable to him. Therefore, Defendants'
13 motion for summary judgment should be granted. While an unexhausted claim is normally
14 dismissed without prejudice, Plaintiff could not timely initiate a grievance for these claims at this
15 point under AR 740; therefore, the dismissal should be with prejudice.

16 **IV. RECOMMENDATION**

17 IT IS HEREBY RECOMMENDED that the District Judge enter an order **STRIKING**
18 Plaintiff's sur-reply (ECF No. 68) as unauthorized under Local Rule 7-2(b), and **GRANTING**
19 Defendants' motion for summary judgment (ECF No. 53).

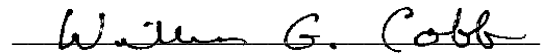
20 The parties should be aware of the following:

21 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to
22 this Report and Recommendation within fourteen days of being served with a copy of the Report
23 and Recommendation. These objections should be titled "Objections to Magistrate Judge's

1 Report and Recommendation” and should be accompanied by points and authorities for
2 consideration by the district judge.

3 2. That this Report and Recommendation is not an appealable order and that any notice of
4 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed
5 until entry of judgment by the district court.

6
7 Dated: January 27, 2021

8 
9 William G. Cobb
United States Magistrate Judge